

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
AMERICAN CIVIL LIBERTIES UNION,)	
OF MASSACHUSETTS; and)	
AMERICAN OVERSIGHT,)	
)	
Plaintiffs,)	
v.)	C.A. No. 19-10916-NMG
)	
UNITED STATES DEPARTMENT OF)	
HOMELAND SECURITY,)	
)	
Defendant.)	
_____)	

DEFENDANT’S RULE 16.1 STATEMENT

Pursuant to Local Rule 16.1, counsel for Defendant submits its Statement.

DEFENDANT’S STATEMENT OF FACTS

On April 23, 2019, Plaintiffs American Civil Liberties Union of Massachusetts, Inc. (ACLU) and American Oversight initiated this action against Defendant the U.S. Department of Homeland Security (DHS) under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), arising out of a FOIA request plaintiffs submitted to DHS on March 11, 2019. *See* Docket Entry No. 1.

In this action, the ACLU seeks a plan (“Border Security Plan”) which it asserts was previously submitted by DHS to the Congressional Hispanic Caucus to the Department of Homeland Security Conference Committee. *Id.*

DHS has located the Border Security Plan and is in the process of forwarding the document for review by the Customs and Border Protection Agency (“CBP”) and, upon CBP’s

review and comments, if any, the DHS will conduct its own review of the document to determine whether it is lawfully exempt from production or will be produced with or without redactions.

DEFENDANT'S PROPOSED SCHEDULE

Plaintiffs' proposed schedule that it submitted with this Court on July 30, 2019, does not take into account the realities encountered by the DHS as they relate to a Freedom of Information Act (FOIA) request, as described below.

1. Briefly, the DHS Privacy Office is responsible for overseeing FOIA operations across the Department.

2. The FOIA Team within the Privacy Office is comprised of three teams: 1) Disclosure; 2) FOIA Appeals and Litigation; and 3) FOIA Policy, Compliance and Training.

3. The DHS Privacy Office's FOIA staff consists of a Deputy Chief FOIA Officer, a Senior Director of FOIA Operations and Management, four (4) director level positions, four (4) litigation analyst positions (to include one (1) contractor), five (5) FOIA specialist positions, and eleven (11) contractors. At this time, six (6) of the DHS Privacy Office FOIA employees are new, with little to no experience processing record for complex FOIA requests and one (1) of the FOIA specialist positions is vacant. The Senior Director position, which supervises the directors and the litigation team, is also currently vacant. The Senior Director position, which supervises the directors and the litigation team, is also currently vacant. In addition, one (1) of the Directors is on a temporary 120-day detail to DHS Cybersecurity and Infrastructure Security Agency (CISA) as the acting FOIA Officer.

4. In FY 2018, the DHS Privacy Office received 1,448 requests, a seven percent increase compared to FY 2017, and processed 1,435 requests, a 39 percent increase compared to

FY 2107. Despite the increase in FOIA requests, and resource constraints, the DHS Privacy Office continues to make good faith efforts and exercises due diligence in processing requests on a “first-in, first-out” basis. As a result of these efforts, the DHS Privacy Office’s backlog ended at 511 requests, a 17 percent increase compared to FY 2017. About two-thirds of the requests received by the DHS Privacy Office are categorized as complex requests, meaning that they require a wide-ranging search, frequently across multiple offices, and involve a large number of records.

5. At bottom, the uptick in FOIA demands over the last two years is a significant departure from the rate of increase seen over the prior decades.

6. Furthermore, during that same time the DHS Privacy Office has experienced an unanticipated spike in FOIA litigation. The DHS Privacy Office is currently involved in 59 active lawsuits, and is responsible for coordinating DHS-wide efforts on an additional 13 cases in which the FOIA requests at issue (seeking various categories of records related to Executive Order No. 13769) were directed only to CBP but require extensive consultation among DHS Components. In FY 2018, the DHS Privacy Office reviewed over 110,000 pages of records from DHS Components relating to FOIA litigation.

7. The DHS Privacy Office has taken a number of steps to address the recent rise in FOIA requests and litigation. For example, the DHS Privacy Office realigned its staff and created three dedicated teams to handle Disclosure; FOIA Appeals and Litigations; and FOIA Policy, Compliance, and Training. The reorganization substantially contributed to a 39 percent increase in processed FOIA requests compared to the previous fiscal year. In addition, there were improved efficiencies on the DHS Privacy Office FOIA Litigation Team processing because staff assigned to such requests were able to concentrate solely on those types of cases.

This team reviewed and processed more than 100,000 pages in FY 2018. In addition, the DHS Privacy Office has been able to substantially increase staffing levels, from 16.58 in FY 2016 to more than 25 Full Time Equivalents in FY 2018, and continues to backfill open positions.

Despite these best efforts, however, the DHS Privacy Office is struggling to handle the significant increase in number of FOIA request and FOIA litigation matters. Many of these litigations have monthly court ordered production deadlines. The DHS Privacy Office is endeavoring to meet all the deadlines at the same time as being responsive to the continuous need to show progress in each given case. DHS employs a multi-track first-in first-out process, which now applies to even those cases in litigation. Previously, DHS had bumped litigated requests to the front of the line.

DHS Privacy Office's Progress on Plaintiff's FOIA Request

As indicated by Plaintiffs, they have been advised that the DHS has completed its search for the Border Security Plan, located the document, and the document is in the pipeline for processing. It has been uploaded to DHS System and will be forwarded to the CBP for its review. Once CBP provides its input to the DHS, DHS will then begin its own internal review process.

In light of the scarcity of resources and the fact that FOIAs are processed on a "first-in" basis, the timeframe for DHS' response cannot accurately be determined at this time.

Accordingly, Defendant proposes filing a Status Report within 30 days of the Scheduling

Conference to inform this Court of the progress made by DHS concerning Plaintiffs' FOIA request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed through the Electronic Court Filing system and will be sent electronically to the registered participants as identified on the NEF.

/s/ Michael Sady
Michael Sady
Assistant U. S. Attorney

Dated: August 2, 2019